IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 359 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BHAVNABEN SHAMJIBHAI

Versus

DINESH PREMJIBHAI KAPADIA

Appearance:

1. Criminal Revision Application No. 359 of 2003

MR MRUGEN K PUROHIT for Petitioner No. 1-2

MR I M PANDYA APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 17/03/2004

ORAL JUDGEMENT

1. Heard Mr. Mrugan K Purohit learned counsel for the petitioner and Mr. I M Pandya learned APP for the

respondent State.

2. Mr.Purohit submitted that the respondent- husband Dineshbhai Premjibhai Kapadia though served through the court has not appeared.

3. Having considered the reasonings advanced by the learned JMFC, Jasdan for rejecting the application filed by the petitioner wife under section 125(3) of Cr.P.C., the court is of the view that the finding recorded by the learned Magistrate is erroneous being misconceived.
4. It is true that for non payment of the amount the husband was once sent to jail and therefore, he cannot be again sent to jail being a defaulter of the very amount during execution proceedings for the recovery of the amount. But as per the ratio of the decision in the case of Smt. Kuldip Kaur vs. Sureinder Singh & anor. reported in AIR 1989 SC 232 it has been held that

" A distinction has to be drawn between a mode of enforcing recovery on the one hand and effecting actual recovery of the amount of monthly allowance which has fallen in arrears on the other. Sentencing a person to jail is a ' mode of enforcement' It is not a 'mode of satisfaction' of the liability. The liability can be satisfied only by making actual payment of the arrears. The whole purpose of sending to jail is to oblige a person liable to pay the monthly allowance who refuses to comply with the order without sufficient cause, to obey the order and to make the payment. They purpose of sending him to jail is not to wipe out the liability which he has refused to discharge. Be it also realised that a person ordered to pay monthly allowance can be sent to jail only if he fails to pay monthly allowance 'without sufficient cause' to comply with the order. It would indeed be strange to hold that a person who 'without reasonable cause' refuses to comply with the order of the Court to maintain his neglected wife or child would be absolved of his liability merely because he prefers to go to jail. A sentence of jail is no substitute fori the recovery of the amount of monthly allowance which has fallen in arrears. Monthly allowance is paid in order to enable the wife and child to live by providing with the essential economic wherewithal. Neither the neglected wife nor the neglected child can live without funds for purchasing food and the essential articles to

enable them to live..."

5. It is argued by Mr. Purohit that for non payment of amount of maintenance of one month, the opponent husband can be sent to jail even ten times. But the court is not convinced by this submission and that is not the intention of the legislature even if sub section 3 of section 125 Cr.P.C. is read in correct perspective. The asset/property is also liable to satisfy the demand made in the execution proceedings and the wife can gradually recover the amount of maintenance in the event of inability on the part of her husband to pay the amount of maintenance by way of attachment of the property of for the period for which the husband was sent to jail for non payment of such accumulated arrears.

6. It seems that the learned Magistrate has rejected the execution application only on the ground that the amount asked for in the execution application includes the amount for which he was sent to jail. That by itself would not make the execution application under section 125(3) Cr.P.C. bad or not maintainable. Jurisdictional error has been committed by the learned Magistrate by dismissing the application under section 125(3) Cr.P.C. On the contrary the learned Magistrate could have issued warrant for attachment of the properties for the accumulated arrears of maintenance, for which he was sent to jail and/or he could have been sent to jail for the subsequent amount of arrears of maintenance due to be paid by the husband. So two different orders also could have been passed (i) attachment of the property for the amont for which he was imprisoned and (ii) arrest for the amount of arrears subsequently accrued; but there was no scope for dismissing the application under section 125(3) Cr.P.C. as if the same is not maintainable.

7. In the circumstances, the learned JMFC, Jasdan is directed to hear and deal with the application under section 125(3) Cr.P.C. in accordance with law and in light of the observation made herein and in view of the the ratio of the decision of the Supreme Court in the case of Kuldip Kaur (Supra) referred to hereinabove by this court. The revision application is required to be allowed accordingly the same is allowed. Rule is made absolute in the above terms.

(C.K.Buch-J)
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